Supreme Court, U.S.
FILED
JUN 9 1999
CLERK

No. 98-1270

In The

Supreme Court of the United States

ALBERTSON'S, INC.,

Petitioner,

v.

UNITED FOOD & COMMERCIAL WORKERS, INTERNATIONAL UNION, AFL-CIO AND CLC; AND LOCALS 44, 81, 367, 381, 555, 1105, 1439, 135, 324, 373, 588, 770, 839, 870, 1036, 1167, 1179, 1288, 1428 AND 1442, UNITED FOOD & COMMERCIAL WORKERS UNION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JAMES H. WEBSTER
(*Counsel of Record*)
RICHARD P. BLUMBERG
LYNN D. WEIR
WEBSTER, MRAK & BLUMBERG
1325 Fourth Ave.,
Suite 600
Seattle, Washington 98101
(206) 223-0344

ALAN HERZFELD
SCOTT MCKAY
NEVIN, HERZFELD & BENJAMIN
P.O. Box 2772
303 West Bannock
Boise, Idaho 83701
(208) 343-1000

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

30 pp

QUESTIONS PRESENTED

Where, as in *Wright v. Universal Maritime Service Corp.*, ___ U.S. ___, 119 S. Ct. 391 (1998), general arbitration clauses in collective bargaining agreements do not clearly and unmistakably provide for arbitration of federal or state statutory wage claims, may union-represented employees pursue such statutory claims in court rather than in arbitration?

May an employer bring an action under Section 301 of the National Labor Relations Act for breach of collective bargaining agreements against the unions with whom it is a party to such agreements when, as in *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionary Workers International*, 370 U.S. 254 (1962), the employer has not first availed itself of the grievance-arbitration mechanism established to address alleged violations of the agreements?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities iii

Statement of the Case 1

Parties 1

Background and Nature of this Litigation 1

The Consolidated Actions Litigation 2

Proceedings in the District Court and Ninth Circuit 4

Reasons to Deny the Writ 5

Summary 5

I. The Court Likely Would Not Reach the Question Presented by Albertson's Petition, Because the Agreements Do Not Clearly and Unmistakably Provide for Arbitration of Statutory Wage Claims 6

II. There Is No Conflict Among the Circuits 15

III. The Court Also Likely Would Not Reach the Question Presented by the Petition, Because Albertson's Has Failed to Submit to Arbitration its Breach of Contract Claims Involving the Interpretation and Application of the Collective Bargaining Agreements 16

IV. Even if these Agreements Clearly and Unmistakably Provided for Arbitration of Statutory Wage and Hour Claims, the Ninth Circuit Correctly Held that Employees Are Not Required to Submit Such Claims to Arbitration Prior to Seeking Statutory Relief 17

Conclusion 29

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) . . *passim*

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) 16

Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir.), *cert. denied*, 519 U.S. 980 (1996) 5, 10, 15, 26

Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981) . . . . . *passim*

Beebe v. United States, 640 F.2d 1283 (Ct. Cl. 1981) 28

Brisentine v. Stone & Webster Engineering Corp., 117 F.3d 519 (11th Cir. 1997) 26

Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945) . . 18, 19

Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionary Workers International, 370 U.S. 254 (1962) 16

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) . . . . . *passim*

Graham Oil Co. v. Arco Products Co., 43 F.3d 1244 (9th Cir. 1994), *cert. denied*, 516 U.S. 907 (1995) . . 6, 28

Hampton v. ITT Corp., 829 F. Supp. 202 (S.D. Tex. 1993) 25

Harrison v. Eddy Potash, Inc., 112 F.3d 1437 (10th Cir. 1997), *judg. vacated on other grounds*, 118 S. Ct. 2364, *on remand*, 158 F.3d 1371 (1998) 26

Kuehner v. Dickinson & Co., 84 F.3d 316 (9th Cir. 1996) 25

TABLE OF AUTHORITIES – Continued

Page

Leahy v. City of Chicago, 96 F.3d 228 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1818 (1997) 25

Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988) 22

Livadas v. Bradshaw, 512 U.S. 107 (1994) ..... *passim*

McDonald v. West Branch, 466 U.S. 284 (1984) 19, 22

Paladino v. Avnet Computer Technologies, Inc., 134 F.3d 1054 (11th Cir. 1998) 28

Penny v. UPS, 128 F.3d 408 (6th Cir. 1997) 26

Peterson v. Kennedy, 771 F.2d 1244 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986) 24

Pforr v. Food Lion, Inc., 851 F.2d 106 (4th Cir. 1988) 14

Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir.), *cert. denied*, 118 S. Ct. 294 (1997) 26

Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965) 16

Satterwhite v. UPS, 496 F.2d 448 (10th Cir.), *cert. denied*, 419 U.S. 1079 (1974) 21

Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364 (1984) 24

Tran v. Tran, 54 F.3d 115 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1417 (1996) 24

Unexcelled Chemical Corp. v. United States, 345 U.S. 59 (1953) 28

United Steelworkers v. Rawson, 495 U.S. 362 (1990) 23, 24

Vaca v. Sipes, 386 U.S. 171 (1967) 23, 24

TABLE OF AUTHORITIES – Continued

Page

Varner v. National Super Markets, Inc., 94 F.3d 1209 (8th Cir. 1996), *cert. denied*, 519 U. S. 1110 (1997) 26

Wright v. Universal Maritime Service Corp., ___ U.S. ___, 119 S. Ct. 391 (1998).....5, 6, 7, 8

DOCKETED CASES

In Re Albertson's Employment Practices Litigation, MDL Docket No. 1215 (D. Idaho) 2

Barton v. Albertson's, Inc., No. CIV-97-0159-S-BLW (D. Idaho) 2

Choate v. Albertson's, Inc., No. CIV-97-0473-S-BLW (D. Idaho) 2

Gloege v. Albertson's, Inc., No. CIV-97-0513-S-BLW (D. Idaho) 2

Mitchell v. Albertson's, Inc., No. CIV-0527-S-BLW (D. Idaho) 2

Rose v. Albertson's, Inc., No. CIV-97-0183-S-BLW (D. Idaho) 2

STATUTES AND RULES

Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* 22, 27

Americans With Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*..... 27

Declaratory Judgment Act, 28 U.S.C. § 2201 1

Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* ....*passim*

Fed. R. Civ. P. 23 23

Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* 21, 23

TABLE OF AUTHORITIES – Continued

Page

National Labor Relations Act, as amended ("NLRA"), 29 U.S.C. § 159(a) 1

Section 301 of the NLRA, 29 U.S.C. § 185 ..... 1, 5, 15

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e 5, 19

42 U.S.C. § 1983 ..... 19, 28

Cal. Labor Code § 1194 27

Ore. Rev. Stat. 652.200 27

Wash. Rev. Code 49.46.030 27

MISCELLANEOUS

62 Fed. Reg. 6690 (Feb. 12, 1997) 27

STATEMENT OF THE CASE

Parties

Petitioner Albertson's, Inc., is a retail grocery chain that, at the time this suit was filed, operated over 800 stores in 19 states. Of Albertson's 85,000 employees, collective bargaining agreements ("CBAs") cover about 28,000 who are represented by thirty-two local unions of the United Food and Commercial Workers Union. Respondents are 20 of these local unions from Washington, Oregon and California ("UFCW locals" or "unions")[1] and the UFCW International Union ("International"). The employees are represented by the UFCW locals for purposes of collective bargaining for wages, hours and working conditions pursuant to Section 9(a) of the National Labor Relations Act, as amended ("NLRA"), 29 U.S.C. § 159(a).

Background and Nature of this Litigation

The International informed Albertson's in mid-1996 that it would assist current and former employees in bringing claims for off-the-clock work violations of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* ("FLSA"), and similar state wage and hour laws unless these claims could be informally resolved in a manner that protected the employees from retaliation. Albertson's responded by filing a preemptive action seeking, *inter alia*, to enjoin the International, the UFCW locals and the Albertson's employees they represent from bringing suit in state or federal court for unpaid wages under the FLSA or state law.

Albertson's sued pursuant to Section 301 of the NLRA, 29 U.S.C. § 185, and the Declaratory Judgment Act, 28 U.S.C. § 2201. In its first amended complaint, Albertson's seeks relief for alleged breaches of CBAs between the UFCW local unions and Albertson's. In Count I, Albertson's contends

---

[1] UFCW Locals 44, 81, 367, 381, 1105 and 1439 (Washington); Local 555 (Oregon); Locals 135, 324, 373, 588, 770, 839, 870, 1036, 1167, 1179, 1288, 1428 and 1442 (California).

that "various UFCW locals and the employees they represent *breached their [CBAs]* by failing to submit statutory off-the-clock work claims to the negotiated grievance/arbitration process." Petition for Writ of Certiorari ("Pet.") at 5 (emphasis added).[2] Yet, as Albertson's concedes, the CBAs between the UFCW locals and Albertson's "typically provide that 'any grievance or dispute concerning the *application or interpretation* of any and all of the provisions' of the agreement shall be submitted to that agreement's dispute resolution procedures." Pet. 4 (emphasis added). None of the CBAs explicitly requires arbitration of any statutory claims, let alone arbitration of statutory wage claims.

The Consolidated Actions Litigation

Two days after Albertson's filed its suit, the first of the wage and hour actions was commenced on behalf of current and former employees, many of whom were represented by the UFCW locals. The employees' claims were for violations of wage statutes, not of the wage provisions of the CBAs. Numerous similar suits followed, all of which were consolidated in the District of Idaho before Judge Winmill, *In Re Albertson's Employment Practices Litigation*, MDL Docket No. 1215 (herein "the Consolidated Actions").[3] In the Consolidated Actions, 70 plaintiffs seek redress on behalf of thousands of current and former Albertson's employees – the

---

[2] The Amended Complaint contains three other counts, also alleging breach of contract claims based on CBAs, not at issue here.

[3] The Consolidated Actions include: *Choate v. Albertson's, Inc.*, No. CIV 97-0473-S-BLW (D. Idaho) (originally filed Sept. 1996, Wash. Super. Ct.); *Gloege v. Albertson's, Inc.*, No. CIV 97-0513-S-BLW) (D. Idaho) (originally filed Sept. 1996, N.D. Cal); *Mitchell v. Albertson's, Inc.*, No. CIV-0527-S-BLW (D. Idaho) (originally filed Sept. 1996, S.D. Fla); *Barton v. Albertson's, Inc.*, No. CIV 97-0159-S-BLW (D. Idaho filed April 1997); and *Rose v. Albertson's, Inc.*, No. CIV-97-0183-S-BLW (D. Idaho filed April 1997). The Multi-District Litigation Panel ("MDL") subsequently ordered four additional cases transferred to the District of Idaho for consolidated proceedings.

majority of whom are not represented by any union – who have worked off the clock with the tacit or explicit approval of their store- and corporate-level managers. These plaintiffs ("Consolidated Action plaintiffs") allege that off-the-clock work by Albertson's employees has been widespread and pervasive, extending back over more than a decade, and that Albertson's managers have permitted and encouraged such work. These allegations are supported by thousands of sworn claim forms and statements.

Albertson's contends that it has maintained a strict written Time Clock Policy prohibiting off-the-clock work. Pet. 3. The plaintiffs in the Consolidated Actions contend that in practice, however, Albertson's uses this policy as a smokescreen to conceal widespread violations of the wage and hour laws and only sporadically enforces the policy at store level. The plaintiffs allege that Albertson's sets unrealistically high production quotas, couples them with unreasonably tight labor budgets that limit the number of scheduled work hours, and then preys on employees' fears and aspirations to exact compliance with the quotas through off-the-clock work. Continued employment of store-level department managers and substantial bonuses are contingent on meeting these unrealistically high production standards. Expectations to complete more tasks than can reasonably be accomplished within the time allotted are conveyed by store- and corporate-level managers with the message: "Get it done no matter what," "If you can't get it done in the allotted time, we'll get someone who can," or "I don't care what it takes, I just don't want to see any [recorded] overtime" – instructions that Albertson's candidly acknowledged less than one month after the first of the Consolidated Actions was filed can be understood as an order to work off the clock.

The Consolidated Action plaintiffs allege that Albertson's unrelenting pressure to reduce labor costs renders its written policy ineffective. Faced with the impossible task of completing too many work assignments in too little time, employees wanting to perform well, retain their jobs and wage levels, or advance in their careers predictably work off

the clock. As long as they do so without complaint, Albertson's turns a blind eye and profits from their unpaid work. But whenever management no longer is able – or for pretextual reasons no longer wishes – to feign ignorance of off-the-clock work, Albertson's blames the employee for violating the policy and takes disciplinary action.

Proceedings in the District Court and Ninth Circuit

Shortly after Albertson's filed this action, Albertson's moved for partial summary judgment on Count I for the UFCW locals' alleged breach of the CBAs for failing to submit to arbitration the statutory claims for violations of the FLSA and state wage and hour laws. The UFCW locals and International moved to dismiss, supported by the Secretary of Labor appearing as *amicus curiae*. Following the precedents of this Court in *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981), and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the district court denied Albertson's motion and granted the respondents' motion, observing that there is an "inherent conflict between arbitration [under the CBAs] and the underlying purpose of FLSA to protect individual workers." App. 37a. Final judgment was entered on this count.

Affirming "on somewhat different reasoning" (App. 4a), the Ninth Circuit noted that this Court's decision in *Barrentine* "makes clear that the rights of employees arising out of the [CBA] are separate and distinct from those arising out of a statute such as the FLSA . . . . " App. 4a. The Circuit relied on this Court's distinction between "vindicat[ion] [of an employee's] contractual right under a [CBA]" and the "assert[ion] [of] independent statutory rights accorded by Congress." App. 5a-6a, *quoting Barrentine*, 450 U.S. at 745-46 and *Alexander*, 415 U.S. at 49-50. The Ninth Circuit further relied on *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991), and *Livadas v. Bradshaw*, 512 U.S. 107, 127 n.21 (1994), which emphasized the " 'distinctly separate nature of . . . contractual and statutory rights' (even when both were 'violated as a result of the same factual

occurrence'),'" and the "concern that in collective bargaining arbitration, 'the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit.' " App. 7a.

REASONS TO DENY THE WRIT

Summary

The Court should deny the writ for four reasons. *First*, as in *Wright v. Universal Maritime Service Corp.*, ___ U.S. ___, 119 S. Ct. 391, 396 (1998), this Court will not reach the question presented by Albertson's petition of whether an explicit "union-negotiated waiver of employees' statutory right to a judicial forum" is enforceable, because the "collective-bargaining agreement[s] in this case do[ ] not contain a clear and unmistakable waiver of the covered employees' rights to a judicial forum . . . . " (*Wright* at 396-97).

Second, there is no conflict between the Ninth Circuit's decision and the decision of any other circuit. Asserting such a conflict, Albertson's relies on *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied*, 519 U.S. 980 (1996), which held that a discharged employee covered by a CBA containing an express provision requiring compliance with all anti-discrimination laws and a clause requiring the arbitration of any dispute arising out of discrimination could not bring suit against her employer under Title VII of the Civil Rights Act of 1964. *Austin* does not conflict with the Ninth Circuit's decision here that employees have the right to bring claims under the FLSA whether or not the CBAs require arbitration of statutory claims. None of the CBAs explicitly require compliance with the FLSA or state wage statutes. Moreover, the Fourth Circuit itself in *Austin* distinguished its decision from a "wage and hour case," such as this involving an FLSA claim. *Austin* at 882-83 n.2.

Third, the Court also is likely not to reach the question presented by the petition, because Albertson's has failed to submit to the contractual dispute resolution processes its claims under Section 301 of the NLRA that the UFCW locals breached the CBAs by failing to arbitrate statutory wage

claims. Any breach of contract claims, which necessarily involve interpretation and application of the CBAs, must be addressed through the grievance-arbitration mechanism, which Albertson's failed to do.[4]

Fourth, whether or not the CBAs require arbitration of statutory claims, the Ninth Circuit correctly held that employees have the right to assert in court claims under the FLSA and comparable state wage and hour laws: Employees may not be required to arbitrate their statutory claims because of the tension between collective representation and individual statutory rights (*Barrentine*, *Alexander*, *Livadas*), and the impossible burdens individual arbitration of all manner of statutory claims would place on unions. In addition, employees may not be forced to sacrifice their individual statutory rights by resorting to the grievance-arbitration procedures of the CBAs which have more limited procedures and rights. *See Graham Oil Co. v. Arco Products Co.*, 43 F.3d 1244 (9th Cir. 1994), *cert. denied*, 516 U.S. 907 (1995).

I. The Court Likely Would Not Reach the Question Presented by Albertson's Petition, Because the Agreements Do Not Clearly and Unmistakably Provide for Arbitration of Statutory Wage Claims.

The employees' claims in this case are for violations of wage statutes, not of the wage provisions of the CBAs. Under *Wright v. Universal Maritime Service Corp.*, 119 S. Ct. 391, 396 (1998), any "CBA requirement to arbitrate [a statutory claim] . . . must be clear and unmistakable." In this case, as in *Wright*, the general arbitration clauses of the CBAs are "very general," "less-than-explicit" and do not "clear[ly] and unmistakabl[y]" provide for arbitration of statutory claims. *Id.* at 396. Consequently, as in *Wright* (at 396-97), this Court likely would not reach the question of whether an explicit "union-negotiated waiver of employees' statutory right to a

---

[4] In contrast, the Consolidated Action plaintiffs' wage claims allege no violations of the CBAs and seek no damages for breach of the CBAs.

judicial forum" is enforceable, because the "collective-bargaining agreement in this case does not contain a clear and unmistakable waiver of the covered employees' rights to a judicial forum . . . . "

The dispute resolution provisions at issue in this case, by their express terms, do not apply to claims arising under the FLSA or state wage laws, or even to "matters under dispute," as in *Wright* (at 396), and apply only to disputes arising under the terms of the contracts. Likewise, the substantive contract provisions governing the parties' conduct regarding off-the-clock work do not agree to comply with the statutory obligations of the FLSA or state law. Simply put, the parties have neither agreed in their contracts to abide by the FLSA or state wage and hour laws, nor agreed "clear[ly] or unmistakabl[y]" to submit claims arising under these statutes to the contracts' dispute resolution processes. Thus, submission of FLSA and state wage claims to arbitration is not a prerequisite to their judicial resolution.

Albertson's asserts that it "presented substantial evidence" in its partial summary judgment motion that the CBAs contained a "clear and unmistakable" agreement to arbitrate statutory claims (Pet. 4, n.1), but fails to cite any such evidence, and indeed there is none.[5]

1. Albertson's concedes that the CBAs between the UFCW locals and Albertson's "typically provide that 'any grievance or dispute concerning the *application or interpretation* of any and all of the provisions' of the agreement shall be submitted to that agreement's dispute resolution procedures."

---

[5] Contrary to Albertson's assertion that "the courts below assumed for purposes of their decisions that the [CBAs] at issue require the arbitration of statutory claims" (Pet. 8), the Ninth Circuit made no such assumption. Instead, the Ninth Circuit held that "employees covered by a [CBA] are entitled to take their FLSA claims to court *regardless of whether those claims may also be covered by the grievance-arbitration procedure*." App. 9a (emphasis added).

Pet. 4 (emphasis added).[6] None of the CBAs explicitly requires arbitration of any statutory claims, let alone arbitration of statutory wage and hour claims.

Indeed, the facts in *Wright* demonstrate that the arbitration clauses of CBAs here do not meet the "clear and unmistakable" standard. In *Wright*, language in a CBA providing for arbitration of "matters under dispute" was not sufficiently explicit to waive the right to a federal judicial forum for statutory claims because the language "*could* be understood to mean matters in dispute under the contract." *Id.* at 396

---

[6] Below, with emphasis, appear the definitions of grievances subject to arbitration from the agreements submitted by Albertson's in support of its motion for partial summary judgment (CR 17, Exhibits to Declaration of Kathryn Bush):

> "Any grievance or dispute concerning the *application or interpretation of this Agreement*" (Exs. 1, 11, 16, 19, 20, 22);
>
> "All matters pertaining to the proper *application and interpretation of any and all of the provisions of this Agreement*" (Exs. 2, 3, 5, 6, 8, 9, 10, 12, 13, 14, 15, 21);
>
> "[Any] dispute over the *interpretation of the terms of this Agreement*" (Ex. 4);
>
> "[A]ny misunderstanding as to the true and clear *interpretation of any part of this Agreement*" (Ex. 7);
>
> "All matter pertaining to the proper *application or interpretation of this Agreement*, or any grievance or dispute arising hereunder" (Exs. 17, 18, 23);
>
> "[A]ll claims, disputes and grievance . . . over the *construction and application of this Agreement*, or relating to working conditions arising out of this Agreement" (Exs. 24, 25, 26, 28);
>
> "Any and all matters of controversy, dispute or disagreement . . . *arising out of or in any way involving the interpretation or application of the terms of this Agreement*" (Ex. 29);
>
> "[A] dispute, difference of opinion between the parties, and grievances of employees *involving or arising out of the meaning, interpretation, application or alleged violation of this Agreement* . . . . " (Exs. 27, 30, 31).

(emphasis added). The provisions in the CBAs at issue here *must* "be understood to mean matters in dispute under the contract": the applicable provisions require arbitration only for such matters as "any grievance or dispute concerning the *application or interpretation* of any and all of the provisions of the agreement." See fn. 6 *supra*.

With respect to resolution of wage claims, the provisions in nearly all agreements with UFCW locals in California emphasize the absence of any waiver of a judicial forum by expressly giving employees the option to submit "direct wage claims . . . to *either* the grievance procedure . . . *or* to any other tribunal or agency which is authorized and empowered . . . " to enforce it.[7] In *Livadas*, this Court identified *this very language* as a case "when it could be said with 'positive assurance' that the parties did *not* intend that state-law claims be subject to arbitration." 512 U.S. 127-28 (citations omitted) (emphasis added).

2. The substantive contract provisions governing the parties' conduct regarding off-the-clock work do not obligate the parties to abide by the FLSA or state wage laws. Instead, the CBAs include their own extensive provisions governing wages, overtime pay, hours of work, and record keeping, and merely coincide with some of the statutory requirements, as outlined below. Albertson's identifies the following provision as typical (Pet. 4):

> The employer shall be responsible for payment for all hours worked, and an employee shall only work those hours specifically authorized by the employer. Accordingly, it is intended that there shall be no "free or time off-the-clock" work practices under this Agreement. Any employee found by the Employer or the Union to be engaging in such practice shall be subject to discipline, which may include termination.

This provision nowhere explicitly requires compliance with the FLSA or state wage statutes, and thus it is irrelevant to

---

[7] See footnote 20 *infra*.

determining whether there have been violations of wage laws that require that such work be recorded and compensated.[8]

This typical provision contrasts with the CBA in *Austin*, where a divided panel of the Fourth Circuit concluded as a matter of contract interpretation that the plaintiff's claim under the ADA and Title VII were covered by mandatory grievance procedures of the contract. The CBA in *Austin* provided that the parties "*comply* with all laws preventing discrimination." (Emphasis added.) The same article also provided that the CBA "shall be administered in accordance with the applicable provisions of the Americans With Disabilities Act," and specified that "any disputes under this Article as with all other Articles of this Contract shall be subject to the grievance procedure." 78 F.3d at 879-80.

Nor does any other CBA at issue here contain provisions that explicitly require the parties to comply with the FLSA or state wage and hour statutes. Rather, nearly all of the CBAs[9] have provisions that set forth the parties' agreed-upon policy concerning off-the-clock work that in some ways mirror, and in other ways vary from, wage and hour statutory requirements. The CBAs with the Northwest locals contain substantially identical provisions that declare that there are to be "no 'free' or 'time-off-the-clock' work practices under this Agreement," and that "[a]ny employee found by the Employer

---

[8] Indeed, one contract declares it irrelevant to the parties' recordkeeping obligation whether the FLSA applies by specifying that the employer agrees to keep time records in the same "manner as is prescribed by the applicable provisions of the Fair Labor Standards Act, whether or not that Act actually applies to the Employer." **CR 148 at No. 4** (§ 3.16, Locals 115, 120, 506, 532 & 588 (Retail Meat), 1991-1995). At most, this provision of this CBA adopts the FLSA standard for recordkeeping only, but imposes no contractual duty to obey the FLSA.

[9] The two exceptions are the contract regarding Max Foods stores with California Locals 135, 324, 770, 905, 1036, 1167, 1428, and 1442, 1994-1996 (**CR 148 at No. 3**), and that with California Locals 135, 439, 551, 770, 905, and 1036, 1994-1996 (**CR 148 at No. 2**), which have no such provision.

or the Union to be engaging in such practice shall be subject to discipline, which may include termination."[10]

In 11 of the Northwest contracts, the language prohibiting off-the-clock work is preceded with the additional statement that "[t]he Employer shall be responsible for payment for all hours worked and an employee shall only work those hours specifically authorized by the Employer."[11] Also, eight

---

[10] CBAs with Local 1439: **CR 17 at Ex. 6** (§ 3.6, Tri-Cities (Meat Dealers), 1995-2000); **Ex. 10** (§ 5.6, Yakima (Grocery/Meat), 1995-1999); **Ex. 4** (§ 9.12, Spokane, WA (Retail Meat), 1994-1999); **Ex. 2** (§ 18.5, Walla Walla, WA (Meat), 1994-1999); **Ex. 3** (§ 5.10, Spokane, WA (Grocery), 1994-1999); **Ex. 5** (§ 5.10, Pasco, Kennewick & Richland Counties (Grocery), 1995-2000); **Ex. 7** (§ 5.11, Walla Walla, WA (Grocery), 1994-1999); **Ex. 8** (§ 5.6, Chelan, Douglas, Kittitas (Grocery), 1995-1999); **Ex. 9** (§ 15.4, Wenatchee County (Meat Dealers), 1996-1999).

CBAs with Local 44: **Ex. 14** (§ 15.04, Snohomish County (Meat Dealers), 1995-1998); **Ex. 12** (§ 2.06, Jefferson/Clallam (Meat Dealers), 1993-1996); **Ex. 18** (§ 9.1, Skagit County (Grocery/Meat), 1993-1996); **Ex. 23** (§ 9.1, Skagit County (Grocery/Meat), 1996-1999); **Ex. 17** (§ 9.1, Whatcom County (Grocery/Meat/Bakery/Deli/Bakery), 1996-1999).

Ex. 13 (§ 15.04, Local 81, King & Kitsap Counties (Meat), 1995-1998); **Ex. 16** (§ 21.1, Local 381, Kitsap & Northern Mason Counties (Grocery/Bakery/Deli), 1995-1998); **Ex. 19** (§ 21.1, Local 381, Jefferson & Clallam Counties (Grocery), 1995-1998); **Ex. 20** (§ 21.1, Local 367, Pierce County (Grocery/Bakery), 1995-1998); **Ex. 11** (§ 21.1, Local 367, Mason-Thurston Counties (Grocery), 1995-1998); **Ex. 21** (§ 12.10, Local 367, Pierce County (Meat Dealers), 1995-1998); **Ex. 22** (§ 21.1, Local 1105, King & Snohomish Counties (Grocery), 1995-1998); **Ex. 1** (§ 4.9, Local 555, Clark County (Grocery), 1994-1996).

CR 148 at No. 12 (§ 2.06, Local 44, Jefferson/Clallam (Meat Dealers), 1996-1999); **No. 35** (§ 5.6, Local 1439, Chelan, Douglas & Kittitas Counties, 1992-1995).

[11] **CR 17 at Ex. 9** (§ 15.4, Local 1439, Wenatchee County (Meat Dealers), 1996-1999); **Ex. 4** (§ 9.12, Local 1439, Spokane, WA (Retail Meat), 1994-1999); **Ex. 2** (§ 18.5, Local 1439, Walla Walla, WA (Meat), 1994-1999); **Ex. 22** (§ 21.1, Local 1105, King & Snohomish Counties (Grocery), 1995-1998); **Ex. 16** (§ 21.1, Local 381, Kitsap & Northern Mason Counties (Grocery/Bakery/Deli), 1995-1998); **Ex. 19** (§ 21.1, Local

add a final sentence that states: "Likewise, the employer shall not encourage, intimidate, or coerce an employee to perform off-the-clock work."[12]

The majority of Albertson's agreements with the California locals set forth the parties' agreed-upon policy concerning off-the-clock work in two provisions.[13] A "Recording Time" section requires Albertson's to post the following in all stores:

> The law and the Union Agreement require that all time worked shall be recorded daily, including starting and stopping time. All employees shall comply strictly with these requirements, and any employee failing to so comply shall be subject to discipline on the same basis as is followed with respect to any other violation of store rules or procedure.

This section also directs the union promptly to file a written report to the employer concerning "any observed violation by an employee of this reporting time provision or the working of unauthorized time," and states further that "the Employer will take the necessary steps with the employee to

---

381, Jefferson & Clallam Counties (Grocery), 1995-1998); **Ex. 20** (§ 21.1, Local 367, Pierce County (Grocery/Bakery), 1995-1998); **Ex. 11** (§ 21.1, Local 367, Mason-Thurston Counties (Grocery), 1995-1998); **Ex. 21** (§ 12.10, Local 367, Pierce County (Meat Dealers), 1995-1998); **Ex. 14** (§ 15.04, Local 44, Snohomish County (Meat Dealers), 1995-1998); **Ex. 13** (§ 15.04, Local 81, King & Kitsap Counties (Meat), 1995-1998).

[12] CBAs with Local 1439: **CR 17 at Ex. 9** (§ 15.4, Wenatchee (Meat), 1996-1999); **Ex. 4** (§ 9.12, Spokane, WA (Retail Meat), 1994-1999); **Ex. 2** (§ 18.5, Walla Walla, WA (Meat), 1994-1999); **Ex. 3** (§ 5.10, Spokane, WA (Grocery), 1994-1999); **Ex. 5** (§ 5.10, Pasco, Kennewick & Richland Counties (Grocery), 1995-2000); **Ex. 7** (§ 5.11, Walla Walla, WA (Grocery), 1994-1999); **Ex. 8** (§ 5.6, Chelan, Douglas, Kittitas (Grocery), 1995-1999); **CR 148 at No. 35** (§ 5.6, Chelan, Douglas & Kittitas Counties, 1992-1995).

[13] Sections 16.2 & 16.3, **CR 17 at Ex. 25** (Local 588, 1992-1995); **Ex. 28** (Local 839, 1992-1995); **Ex. 24** (Local 1288, 1992-1995); **Ex. 31** (Local 373, 1992-1995); **Ex. 30** (Local 1179, 1992-1995). **CR 148 at No. 6** (Local 870, 1992-1995).

correct such violation." The section requires in the event of a second violation by the same employee, the employer must

> pay to the Welfare Fund provided for herein an amount equal to the overtime pay due and payable to the employee. In such case, the employee involved shall be subject to discharge; retaining, however, his right to appeal any such discharge under this Agreement.

Following this section is a provision denoted "Free Time," which states:

> When an employee willfully violates the provisions of this Agreement by working free time without the knowledge of the Employer, after a second written notice by the Union of this employee's repeated contract violation, the Employer agrees to discharge said employee within seven (7) days after receiving written notice of such violation.[14]

None of these contract provisions require compliance with the FLSA; each simply establishes the parties' respective rights and obligations under the CBAs with respect to the

---

[14] One agreement contains a variation of these provisions. This "Falsification of Time Records" provision requires the employer and employee to maintain daily time records, and requires the employee to verify his time weekly. If there is a proven employee falsification of these records, in cases where the employer had no knowledge of the falsification, the employer may summarily dismiss the employee, and the employee is entitled only to pay for the time reported. Where it is shown that both the employee and the employer knew of the falsification, the employer may discipline the employee and pay him for all time worked by check mailed to the union. In such cases, where the employer pays the employee for work that was not recorded on the time report, the employer must pay an equal amount to the health and welfare fund. Claims in these cases are limited to the 90-day period prior to the date they are presented to the employer. Finally, if the time worked without pay is the result of coercion, and the employee has reported the coercion to the union within the prescribed period, the employer must make payments to the health and welfare fund, and the employee is not subject to discipline, and is entitled to pay for all time worked. **CR 17 at 29** (Art. 5, ¶ N., Locals 135, 324, 770, 1036, 1167, 1428 & 1442, 1995-1999).

recording of hours worked and the working of unrecorded time. The requirement in most of the California CBAs that Albertson's notify employees that the law requires that all time be recorded cannot be equated with an agreement to obey that law, let alone agreement to arbitrate alleged violations of it. Where the CBAs' provisions vary from the statutory requirements, it indeed would be anomalous to equate such provisions with an agreement to obey those laws.[15]

Under the FLSA, employers are required to maintain accurate time records (29 U.S.C. § 211(c)), and pay their employees at least the statutory minimum for all straight time hours as well as overtime pay for all hours worked over forty in a workweek (*see* 29 U.S.C. §§ 206, 207) that the employee is permitted to work, i.e., work performed with the actual or constructive knowledge of the employer. *Pforr v. Food Lion, Inc.*, 851 F.2d 106, 109 (4th Cir. 1988). This statutory duty to compensate employees for all hours worked applies equally to recorded and unrecorded work time. Unlike the FLSA, the CBAs place primary responsibility for proper record keeping and the prevention of off-the-clock work on the employee, imposing no explicit responsibility on Albertson's. Unlike the FLSA, all off-the-clock work provisions in the CBAs subject employees to discipline for off-the-clock work, even work permitted by Albertson's. Unlike the FLSA, the applicable

---

[15] The CBAs recognize this potential conflict. The same agreements that include these "Recording Time" and "Free Time" provisions also make a brief reference to the FLSA in the preamble of the section concerning hours, overtime and Sunday premium pay, which provides that in the event the "Federal Wage and Hour Law" applies and "conflicts with the intent of this Agreement," the parties agree to renegotiate the agreement "to preserve the intended work week and the rates pertaining thereto." **CR 148 at No. 10** (§ 6, Local 588, 1992-1995); **No. 11** (§ 6, Local 839, 1992-1995); **No. 9** (§ 6, Local 1288, 1992-1995); **No. 8** (§ 6, Local 373, 1992-1995); **No. 7** (§ 6, Local 1179, 1992-1995); **Ex. 6** (§ 6, Local 870, 1992-1995). Plainly, this reference does not create any obligation on the part of Albertson's to comply with the FLSA as part of its contract.

CBA provisions impose no explicit duty on Albertson's to compensate employees for unrecorded hours of work.[16]

In sum, the off-the-clock work and related provisions at issue create rights and obligations under the parties' CBAs that are independent and separate, and in some ways vary from, those established by the FLSA. In no way can such provisions be interpreted as an explicit waiver of employees' statutory right to a judicial forum for resolution of statutory claims.

II. There Is No Conflict Among the Circuits.

There is no conflict between the Ninth Circuit's decision and the decision of any other circuit. In its effort to raise a conflict, Albertson's relies on *Austin*. As discussed above, unlike *Austin*, none of the CBAs at issue here contain provisions that explicitly require that the parties comply with the relevant statutory law. Further, the Fourth Circuit itself distinguished its decision from a "wage and hour case," such as this involving an FLSA claim. *Austin* at 882-83 n.2. The court found the case dissimilar to *Barrentine* and its progeny on the grounds that the FLSA, unlike Title VII and the ADA, "does not contain any provision encouraging arbitration," and because *Barrentine* "held that 'congressionally granted FLSA rights take precedence over conflicting provisions in a collective bargaining compensation arrangement[.]' " 78 F.3d at 882-83 n.2, *quoting Barrentine*, 450 U.S. at 740-41.

---

[16] The CBAs provide their own schedules of wage rates for the pertinent job classifications, which are separate and distinct from the FLSA's minimum wage requirement.

III. The Court Also Likely Would Not Reach the Question Presented by the Petition, Because Albertson's Has Failed to Submit to Arbitration its Breach of Contract Claims Involving the Interpretation and Application of the Collective Bargaining Agreements.

The Court also is likely not to reach the question presented by the petition, because Albertson's has failed to submit to arbitration its breach of contract claims involving interpretation and application of the CBAs. Section 301 requires, as Albertson's concedes (CR 17, Bush Decl., at 5-7), that Albertson's first seek arbitration before bringing suit over any alleged breach of the CBAs involving, or disputes concerning, the interpretation or application of those agreements.

An employer who has not fulfilled its promise to arbitrate "disputes . . . involving questions of interpretation or application of any clause or matter" covered by the contract may not bring a lawsuit alleging a breach of the CBA. *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionary Workers*, 370 U.S. 254, 258 (1962). Dismissal is appropriate for failure to make use of the grievance procedure established in the CBA. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220-21 (1985); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965).

Albertson's claims in Count I are based upon alleged breaches of the CBAs. Albertson's asserts, and the defendant unions dispute, that the CBAs include an agreement that Albertson's employees may not bring suit in state or federal court for unpaid wages under the FLSA or state law, as opposed to claims under the CBAs. This dispute concerns the application or interpretation of the CBAs – namely whether Albertson's and the UFCW local unions have agreed that statutory wage claims of the local unions' members must be submitted to arbitration, and, if so, whether the union's alleged failure to do so violates the CBAs. Accordingly, the

Court is not likely to reach the question presented by Albertson's, because of Albertson's failure to submit its claims to arbitration.

IV. Even if These Agreements Clearly and Unmistakably Provided for Arbitration of Statutory Wage and Hour Claims, the Ninth Circuit Correctly Held That Employees Are Not Required to Submit Such Claims to Arbitration Prior to Seeking Statutory Relief.

Even if the grievance-arbitration provisions of the CBAs between the UFCW locals and Albertson's clearly and unmistakably were applicable to FLSA and state statutory claims, the Ninth Circuit correctly held that the aggrieved employees are not required to exhaust such procedures before filing a statutory lawsuit under section 16(b). Albertson's contends that the Ninth Circuit misapplied this Court's prior decisions regarding the arbitrability of statutory claims. Pet. 9. But the Ninth Circuit's decision is solidly supported by this Court's decision in *Barrentine*, where the tension between collective representation and individual statutory rights was resolved in favor of individual rights guaranteed by the FLSA. Moreover, such a requirement would force employees to sacrifice statutory rights in the more limited grievance-arbitration procedures and rights of the CBAs.

A. In *Barrentine*, the Court held that unfavorable resolution of the employees' wage claims under collectively bargained dispute resolution procedures did not bar a subsequent lawsuit under the FLSA based on the same facts. The Court recognized that "[t]wo aspects of national labor policy [were] in tension in [the] case": one reflected in the nation's labor management laws, which promote collective bargaining and industrial self-government; and the other exhibited in statutes, such as the FLSA, which govern the individual employer-employee relationship and ensure covered employees certain substantive rights. 450 U.S. at 734-35. The Court reconciled the "tension" between the two statutory schemes in favor of the individual rights.

Observing that in section 16(b), the FLSA "grants individual employees broad access to the courts," the Court emphasized that "[n]o exhaustion requirement or other procedural barriers are set up [under the FLSA], and no other forum for enforcement of statutory rights is referred to or created by the statute." *Id.* at 740.[17] Furthermore, the Court noted that its prior decisions stressed the "nonwaivable nature of an individual employee's right to a minimum wage and to overtime pay under the Act . . . [and] held that FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." *Id.* (citations omitted).[18] Likewise, the Court affirmed its earlier holdings that "congressionally granted FLSA rights take precedence over conflicting provisions in a collectively bargained compensation arrangement." *Id.* at 740-41 (citations omitted).

The Court in *Barrentine* reasoned further that employees' FLSA rights to minimum wage and overtime pay are best protected in a judicial rather than an arbitral forum. In this regard, the Court underscored the substantial disadvantages of subjecting an employee's FLSA wage claims to arbitration.

---

[17] The Court emphasized in *Barrentine* that a requirement to exhaust collectively-bargained dispute resolution procedures would undermine important legislative objectives. Congress enacted section 16(b) in the original statute of 1938 as a means to vindicate their individual rights to statutory wages. *See generally Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 705-06 nn.15 & 16 (1945) (discussing legislative history).

[18] One of the decisions cited by the Court is *Brooklyn Bank v. O'Neil*, 324 U.S. 697 (1945). There, the Court held that an employee cannot contractually waive the right to recover liquidated damages guaranteed under section 16(b), reasoning that such a waiver would undermine Congress's purposes in enacting the FLSA "to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce." 324 U.S. at 706.

The Court observed that in processing the dispute in arbitration, the union, "without breaching its duty of fair representation, reasonably and in good faith" may sacrifice the statutory rights of individual employees in order to further the collective good of the bargaining unit; that even where the union vigorously supports the wage claim, arbitrators may not have the competence to determine the complex issues which typically arise under the FLSA; that "because the arbitrator's authority is limited to construing the meaning of the collective-bargaining agreement so as to effectuate the collective intent of the parties . . . rather than to enforce the statute, he may issue a ruling that is inimical to the public policies underlying the FLSA[;]" and, finally, that arbitrators lack power to grant employees "as broad a range of relief." *Id.* at 742-45. The Court concluded that "FLSA rights . . . are independent of the collective bargaining process," belong to the workers as individuals, not as members of a labor union, and "are not waivable." *Id.* at 745.

The *Barrentine* Court relied extensively on the analysis in *Alexander v. Gardner-Denver Co.* There, the Court determined that an employee's unsuccessful arbitration of his claim under the non-discrimination clause of his union contract did not preclude a subsequent action under Title VII of the Civil Rights Act. *See also McDonald v. West Branch*, 466 U.S. 284 (1984) (award in an arbitration proceeding pursuant to a CBA not a bar to suit under 42 U.S.C. § 1983).

Albertson's suggestion (Pet. 8 n.4) that employees must at least exhaust arbitration before bringing suit is directly contrary to *Barrentine*. The Court in *Barrentine* made explicit that whether or not the employees had first submitted their FLSA claims to the grievance-arbitration process did not affect the Court's holding that the employees retained their right to sue under section 16(b). 450 U.S. at 731 n.6. The Court reached this conclusion despite the fact the dispute resolution provision at issue – covering "any controversy which might arise" – was broad enough to encompass the employees' FLSA claims, and that under the terms of the provision, the parties expressly agreed not to bring any "legal

proceedings without *first* using all possible means of settlement as provided in this Agreement . . . . " *Id.* at 731 n.5 (emphasis added).

As demonstrated above, the CBAs in this case do not contain coverage language as broad, nor do they expressly require prior submission of any dispute to the contract dispute resolution procedures.[19] Indeed, virtually all the California agreements include a provision which provides, to the contrary, that "[i]n the case of a direct wage claim . . . which does not involve an interpretation of any of the provisions of this Agreement, either party may submit such claim for settlement *to either the grievance procedure provided for herein or to*

---

[19] Albertson's contends that "*at the very least* the effect of the agreements is to require that statutory wage and hour claims be submitted to arbitration before they are pursued *de novo* in court." Pet. 8 n.4. This ignores that if the right to a judicial forum to adjudicate statutory claims were waivable – and indeed waived in this case – such claims would be subject to arbitration, the "outcome" of which under the CBAs is, Albertson's acknowledges, "final and binding" (Pet. 8 n.4), and not subject to trial *de novo* following arbitration. There is no provision in the CBAs here for submitting statutory claims to non-binding arbitration with right of trial *de novo* in court. Albertson's seeks to distinguish *Alexander*, *Barrentine*, *Gilmer* and *Livadas* on the basis that they "did not involve collectively bargained agreements to arbitrate statutory claims at all, much less requirements only that employees submit such claims to arbitration prior to filing suit . . . . " Pet. 11. Albertson's suggestion of a middle ground is supported neither in law nor fact. Either there is a waiver of the right to a judicial forum or there is not. If, as here, there is no waiver, then under *Wright*, there is no obligation to arbitrate the claim. To be sure, this Court in *Barrentine* permitted an employee to bring an FLSA suit following unsuccessful arbitration of the claim. But the Court found no obligation first to arbitrate the claim.

Moreover, Albertson's proposed trial *de novo* of claims of union members following individual arbitration would require at least two separate trials of the statutory claims of the Consolidated Action plaintiffs, one for non-union members followed by one or many trials for union members, an enormous waste of judicial resources.

any other tribunal or agency which is authorized and empowered to effect such a settlement."[20]

Noting that four of the plaintiffs had not brought any grievance proceedings prior to filing the FLSA suit, the Court in *Barrentine* declared that "our holding does not depend on whether petitioners formally filed grievances[.]" *Id.* at 731-32 n.6.[21]

This Court reaffirmed the continuing validity of *Barrentine* in *Gilmer*. In *Gilmer*, the Court held that a securities representative's agreement to arbitrate, contained in his industry registration application, was enforceable under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., and therefore, required him to submit his Age Discrimination in Employment Act ("ADEA") claim to arbitration. The Court distinguished *Barrentine*, as well as *Alexander* and *McDonald*, on several grounds, all of which support respondents' position here: Unlike the case before it, the *Barrentine* line of cases did not involve an agreement to arbitrate statutory claims, but rather contract-based wage claims arising under the CBA, and thus, the labor arbitrators in these cases lacked authority to resolve statutory claims; the *Barrentine* line of cases arose in the context of a CBA, and thus in the arbitration proceedings the employees were represented by

---

[20] **CR 17 at Ex. 24** (§ 18.8, Local 1288, 1992-1995); **Exs. 25 & 26** (§ 18.8, Local 588, 1992-1995); **Ex. 27** (§ 18.8, Local 870, 1992-1995); **Ex. 28** (§ 18.8, Local 839, 1992-1995); **Ex. 29** (§ 15D.3., Locals 135, 324, 770, 1036, 1167, 1428 & 1442, 1995-1999); **Ex. 30** (§ 18.8, Local 1170, 1992-1995); **Ex. 31** (§ 18.8, Local 373, 1992-95); **CR 148 at No. 2** (§ 15.7, Locals 135, 439, 551, 770, 905 & 1036 (Max Foods Meat), 1994-1996); **No. 3** (§ 15.7, Locals 135, 324, 770, 905, 1036, 1167, 1428 & 1442 (Max Foods), 1994-1996) (emphasis added).

[21] Albertson's misplaces reliance (Pet. 15-16, 23-24) on *Satterwhite v. UPS*, 496 F.2d 448, 451 (10th Cir.), *cert. denied*, 419 U.S. 1079 (1974), to assert that FLSA claims are more suitable than discrimination claims to the collectively-bargained arbitral process. Given that *Barrentine* in effect overruled *Satterwhite*'s holding that an employee may not bring an FLSA lawsuit after he has unsuccessfully grieved under a CBA, *Satterwhite* is not persuasive authority.

their unions, and "an important concern therefore was the tension between collective representation and individual statutory rights[;]" and finally, the *Barrentine* line of cases "were not decided under the FAA." 500 U.S. at 35. Thus, the Court's decision in *Gilmer* in no way contradicts its earlier decisions in *Barrentine*, *Alexander*, and *McDonald*. Indeed, the Court has expressly said so:

> *Gilmer* emphasized its basic consistency with our unanimous decision in *Alexander v. Gardner-Denver Co.*, ... *Gilmer* distinguished *Gardner-Denver* as relying, inter alia, on: the "distinctly separate nature of . . . contractual and statutory rights" (even when both were "violated as result of the same factual occurrence"); the fact that a labor "arbitrator has authority to resolve only questions of contractual rights," and the concern that in collective bargaining arbitration, "the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit."

Livadas, 512 U.S. at 127 n.21 (citations omitted) (ellipsis within internal quotation added by the Court). *See also Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 411 (1988) (citing *Barrentine* approvingly, Court notes that "substantive rights in the labor relations context can exist without interpreting [CBAs]"); *Wright*, 119 S. Ct. at 396 (noting that employee's statutory cause of action "is distinct from any right conferred by the [CBA]").

Although *Gilmer* may reflect greater judicial tolerance for arbitration in certain circumstances, the rights guaranteed under section 16(b) of the FLSA are individual rights and should not be limited by views as to the collective good of the bargaining unit. *Barrentine*, 450 U.S. at 742-45.[22] Contrary to

---

[22] Albertson's assertion (Pet. 14 n.7) that tension between individual and collective interests, as in the context of labor arbitration, also exists in the context of UFCW-sponsored lawsuits is untrue, because the union would be unable to sacrifice individual claims given the rigorous judicial

Albertson's assertion, a union's duty of fair representation[23] does not contain adequate safeguards to ensure that individual statutory rights can be protected in a collectively-bargained dispute resolution setting.

While the doctrine is "an important check on the arbitrary exercise of union power," it is "a purposefully limited check, for a 'wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents.' " *United Steelworkers v. Rawson*, 495 U.S. 362, 374 (1990), *quoting Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). A union does not violate that duty by "taking a good faith position *contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another.*" *Barrentine*, 450 U.S. at 742 n.20, *quoting Humphrey v. Moore*, 375 U.S. 335, 349 (1964) (emphasis added).

Thus, "a union balancing individual and collective interests might validly permit some employees' statutorily granted wage and hour benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole." *Barrentine* at 742.[24]

---

oversight of class certification and settlement provided by Fed. R. Civ. P. 23. Moreover, counsel in the Consolidated Actions control the litigation, not the union, as the district court has previously found. In addition, employees must **individually** consent to participate in collective actions brought under section 16(b).

[23] Under the doctrine of fair representation, the union's "statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interest of all members without hostility or discrimination toward any, and to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). A breach occurs "only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 190.

[24] In so holding, the Court recognized "a union's objective is to maximize overall compensation of its members, not to ensure that each

The propriety of such a balance also reflects the Court's recognition that labor "arbitration may be expensive[.]" *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 375 (1984) (footnote omitted). "The cost of arbitration is at least one reason why this Court has declined to agree that individual employees represented by the union have an absolute right to have their grievances taken to arbitration." *Id.* at 375 n.19, *citing Vaca v. Sipes*, 386 U.S. at 191-92. "The union may exercise its discretion in good faith to settle grievances 'prior to the most costly and time-consuming step in the grievance procedures.' " *Id.*, *quoting Vaca* at 191. To require as a general rule that unions arbitrate individual employment claims of all sorts, including FLSA and state-law claims as in this case, would be so burdensome as ultimately to defeat the employees' collective bargaining interest in having a strong and effective union. *See Peterson v. Kennedy*, 771 F.2d 1244, 1255 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986).[25]

Citing *Barrentine*'s "renewed vitality under *Gilmer*," the only other appellate court to confront a CBA's arbitration requirement in the context of FLSA rights held that exhaustion is not required. *Tran v. Tran*, 54 F.3d 115, 118 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1417 (1996). In *Tran*, the Second Circuit concluded that "nothing in *Gilmer* . . . appears

---

employee receives the best compensation deal available . . . . " *Barrentine* at 742. Other aspects of the doctrine are inconsistent with effective representation of individual statutory rights. For example, "mere negligence, even in the enforcement of a [CBA], would not state a claim for breach of the duty of fair representation . . . . " *United Steelworkers v. Rawson*, 495 U.S. at 372.

[25] A result in this case that would require union-represented employees individually to exhaust CBA procedures, and thereby effectively preclude their availment of the advantages of class and collective action litigation, while permitting Albertson's non-union employees to proceed "would turn the policy that animated the Wagner Act on its head" by "penaliz[ing] workers who have chosen to join a union by preventing them from benefiting from" such procedures. *Livadas*, 512 U.S. at 129 (citation omitted) (invalidating state policy of not enforcing state wage law on behalf of employees covered by CBA arbitration procedures).

to throw anything but favorable light upon the continuing authority of *Barrentine*." *Id.* at 117. Thus, the court determined that the employee could pursue judicial remedies without seeking prior arbitration of his FLSA back pay claims. *Id.*[26]

Moreover, since *Gilmer*, the overwhelming majority of appellate courts addressing the issue under statutes other than the FLSA also have upheld an employee's right to sue without exhausting collectively-bargained arbitration procedures, regardless of whether the employee's union has agreed to

---

[26] Albertson's relies on *Kuehner v. Dickinson & Co.*, 84 F.3d 316 (9th Cir. 1996); *Hampton v. ITT Corp.*, 829 F. Supp. 202 (S.D. Tex. 1993); and *Leahy v. City of Chicago*, 96 F.3d 228 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1818 (1997). But *Kuehner* is readily distinguishable. The Ninth Circuit, following *Gilmer*, determined that a stockbroker could not pursue relief under the FLSA before submitting her claims to arbitration, in light of her arbitration agreement in her securities registration form, which was subject to the FAA. The case did not involve a collective bargaining or other employment agreement, but an individual registration agreement. Thus, as the court pointed out, the case differed from *Barrentine* because *Barrentine* was " 'not decided under the FAA.' " 84 F.3d at 320, *quoting Gilmer*, 500 U.S. at 35. *Hampton v. ITT Corp.* likewise is distinguishable on these grounds.

In *Leahy*, a Seventh Circuit panel held, over a strong dissent by Judge Cudahy, that because a CBA provided that a police officer is entitled to overtime pay for hours worked in excess of eight hours per day, that indicated that if an officer works more than eight hours in a day as a result of working during a meal period, the City will pay overtime rates for the excess work time. The court thus dismissed a complaint by officers claiming that their meal periods constituted compensable time under the FLSA. The rationale of the majority was based on its view that in computing work hours under the FLSA, "employers and employees may resolve whether certain activity is 'work' through a [CBA], as long as the agreement comports with the FLSA." *Id.* at 232. The panel's suggestion that the agreement's grievance process is "the most efficient way to determine whether an officer's meal period should be compensable work time" (*id.*), although erroneous in our view, in no manner endorses a broad doctrine requiring exhaustion prior to filing a statutory claim.

arbitrate statutory claims.[27] The exception is *Austin*, which is both distinguishable for the reasons discussed above, and wrongly decided.[28]

The Ninth Circuit correctly held that employees are not required to submit their statutory wage claims to collectively-bargaining arbitration procedures prior to bringing suit.

---

[27] *See Penny v. UPS*, 128 F.3d 408, 414 (6th Cir. 1997) (concluding, where CBA provided for arbitration of ADA claims, "employee whose only obligation to arbitrate is contained in a [CBA] retains the right to obtain a judicial determination of his rights under . . . the ADA"); *Brisentine v. Stone & Webster Engineering Corp.*, 117 F.3d 519, 526 (11th Cir. 1997) (ADA) (holding arbitration of federal statutory claim not required, *unless* three requirements are met: the employee agreed individually (not through his union) to contract containing arbitration clause, the arbitrator is authorized to resolve federal statutory claims, and employee has the right under contract to insist on arbitration if statutory claim is unsatisfactorily resolved in grievance process); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1454 n.2 (10th Cir. 1997) (Title VII) (adopting, without having before it the pertinent CBA, "majority view . . . that *Alexander* and its progeny 'remain good law and that statutory employment claims are independent of a [CBA]'s grievance and arbitration procedures' " (citation omitted)), *judg. vacated on other grounds*, 118 S. Ct. 2364, *on remand*, 158 F.3d 1371 (1998); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir.) (ADA & ADEA) (holding union cannot waive employee's statutory right to judicial forum "by signing [CBA] that consigns the enforcement of statutory rights to the union-controlled grievance and arbitration machinery created by the agreement"), *cert. denied*, 118 S. Ct. 294 (1997); *Varner v. National Super Markets, Inc.*, 94 F.3d 1209 (8th Cir. 1996) (Title VII & state claims) (holding, without consideration of whether collectively bargained grievance provisions covered statutory claims, prior exhaustion not required), *cert. denied*, 519 U. S. 1110 (1997).

[28] *Austin* was wrongly decided for the reasons stated by the dissent. The majority failed to recognize that *Gilmer* and its progeny arose in the context of a private agreement (and not in the context of a CBA), which "makes all the difference." 78 F.3d at 886 (Hall, J., dissenting). As the dissent noted, "[a] labor union may not prospectively waive a member's individual right to choose a judicial forum for a statutory claim." *Id.* In addition, the dissent noted further, *Gilmer* did not overrule the *Gardner-Denver* line of authority, and "*Gardner-Denver* is the law." *Id.* at 887.

B. The other substantial disadvantage to employees of subjecting their FLSA and other statutory wage claims to arbitration is the more limited procedures and rights available under the CBAs. As with the CBAs in this case, labor arbitrators often lack the power to grant employees the necessary statutory relief. For example, although employees might recover the back wages owed under CBA dispute-resolution provisions, the contract remedies neither provide full relief for FLSA violations, nor serve to deter future violations, as does a section 16(b) suit, because none of the agreements provide for liquidated damages. Several California agreements authorize an award of 7% interest on monetary claims (see CR 17 at Ex. 28, 24 & 30 (§ 18.7); CR 148 at Nos. 6 & 10 (§ 18.7)), but such interest is not comparable to the double damages provided in an FLSA liquidated damages award. In addition, as discussed above, the CBAs have provisions that vary from, and in some cases are inconsistent with, the FLSA and many state wage statutes. For example, the latter provide for recovery of attorneys' fees by prevailing employees. *E.g.* 29 U.S.C. § 216(b); Cal. Labor Code § 1194; Ore. Rev. Stat. 652.200; Wash. Rev. Code 49.46.030. By contrast, the CBAs here have no such provisions; and some impose the arbitrator's fees on the losing party (*e.g.* CR 17, Ex. 1, § 18.1), while others require such fees to be borne equally by each party (*e.g. id.*, Ex. 2, § 19.2). If only in a trial de novo are the full panoply of remedies available, an arbitration proceeding is meaningless and a massive waste of resources.[29]

---

[29] Albertson's mistakenly relies (Pet. 23) on the Labor Department's proposed pilot test program using alternative dispute resolution in a select group of employment law cases, including FLSA cases (*see* 62 Fed. Reg. 6690 (1997)). As the Secretary of Labor stated in her amicus brief to the Ninth Circuit at 18-19 n.24 (emphasis in original):

> Under the proposed program, FLSA claims are *not* the subject of arbitration. Rather, after investigation of the FLSA complaint, the failure of administrative efforts to settle the case, and a determination that the case meets certain criteria, the Department will offer the employer and employee the option of voluntary *mediation. See* 62 Fed. Reg. at 6693-6694.

Moreover, unlike the arbitration provisions in *Gilmer*, short limitations periods apply to filing grievances under the CBAs in this case. *E.g.* CR 17, Ex. 1, § 18.1 (20 days). Nor would a labor arbitrator necessarily have authority to toll the FLSA statute of limitations during the arbitration process. *See Unexcelled Chemical Corp. v. United States*, 345 U.S. 59, 65-66 (1953) (pursuit of administrative relief does not toll § 16(b) limitations period). Where off-the-clock work is alleged, the statute of limitations operates to cut off employees' claims pay period by pay period. *E.g. Beebe v. United States*, 640 F.2d 1283, 1293 (Ct. Cl. 1981) (separate cause of action accrues each payday). Thus, even if trial de novo in federal court were available, important substantive rights would be lost.[30]

Moreover, in selecting appropriate cases for mediation, the Department will not "recognize any prior agreement that makes the use of mediation or arbitration a condition of employment or otherwise prospectively requires the use of ADR in an employment dispute." *Id.* at 6694.

[30] Even outside labor arbitration, such disadvantages in the arbitration, as contrasted to the judicial arena, render arbitration provisions unenforceable. *E.g. Graham Oil Co. v. Arco Products Co.*, 43 F.3d 1244 (9th Cir. 1994), *cert. denied*, 516 U.S. 907 (1995) (franchisees not required to exhaust arbitration under agreement covered by FAA because they would lose important federal statutory remedies, such as statutory periods of limitations, exemplary damages for willful violations, and attorneys fees for prevailing parties); *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998) (affirming refusal to compel arbitration under clause providing for arbitration of any claim arising from employment but further providing that damages could be awarded for breach of contract only).

CONCLUSION

For the foregoing reasons, respondents request that the petition be denied.

Respectfully submitted,

JAMES H. WEBSTER
RICHARD P. BLUMBERG
LYNN D. WEIR
ALAN HERZFELD
SCOTT MCKAY
Counsel for Respondents

June 1999